

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5244 IN THE)
NAME OF JAMES AND/OR)
PAULA WHITTAKER)
_____)

FINAL ORDER

On May 17, 1999, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in connection with Application for Transfer No. 5244 (the "application") filed in the name of James and/or Paula Whittaker (the "applicant"). On June 7, 1999, the applicant filed "Applicants' Exceptions to Proposed Memorandum Decision and Order" with the Department. On June 29, 1999, Beva Lue Clark (the "protestant") filed a response to the exceptions.

The Director has reviewed the exceptions and response to exceptions and responds as follows:

Finding of Fact No. 9 – This finding is changed to recognize that Big Timber Creek ("Timber Creek") is the primary source of water diverted for irrigation to the homesteads and that water diverted from springs provides only a small portion of the water diverted for irrigation. This finding is also reworded to clarify that consistent with Finding of Fact No. 16, water diverted for irrigation is not the only source of water consumed by crops growing on the homesteads. The fourth sentence in Finding of Fact No. 9 of the Recommended Order (the last sentence of Finding of Fact No. 9 in this Final Order) is accurate, since none of the parties could specifically quantify the acreage supplied with water from the various sources. However, this sentence is reworded for clarification. Regarding the validity of the water rights sought for transfer, there is no intent in the Recommended Order to infer that the rights are "invalid" as alleged in the exceptions filed by the applicant.

The number of springs or the specific acreage supplied with water from the various sources is not at issue in this matter. The central issue that applies to this application for transfer is whether injury to any other water rights would occur if the applicant transfers its water rights for irrigation from the current point of diversion and place of use downstream approximately 4½ miles to another point of diversion and place of use.

When the holder of a senior water right seeks to cease irrigating the original land under the water right and transfer the water right to another place of use, the junior appropriators downstream of the original place of use are entitled to that portion of the water diverted under the senior water right that would ordinarily not be consumed by crops growing at the original place of use but would return back to the stream. If such return flow is not maintained, injury occurs to those junior appropriators who have relied on that return flow. A transfer of a water right that would result in significantly increased consumption of water diverted under the water right from that which historically occurred under the water right would result in a corresponding decrease in return flow to the stream. Since such a transfer would reduce the return flow relied upon by downstream junior appropriators, injury would occur as a result of such increase in consumptive use, unless stream flows are otherwise sufficient at all times to supply the junior water rights.

Finding of Fact No. 10 – This finding is changed to clarify that diversion from the Unnamed Stream would also need to cease, along with ceasing diversions from the two points of diversion from Timber Creek, if the proposed transfer would otherwise be approved.

Finding of Fact No. 11 – This finding is not changed. Although the applicant and the protestant disagree on how much land would be irrigated under the proposed transfer, the testimony described that 105 to 112 acres would be irrigated. The applicant testified that 17 acres of the land that would be irrigated under the proposed transfer is already irrigated and would continue to be irrigated from an existing pivot system. However, the applicant testified that all of the acreage at the proposed place of use is presently planned to be irrigated using water diverted under the proposed transfer.

Finding of Fact No. 16 – This finding is not substantially changed, since the applicant did not show that at least 88 acres would be dried up at the original place of use so that consumptive use of the water diverted under the water rights at the proposed new place of use would not be significantly greater, and return flows significantly less, than what historically occurred under the water rights at the current place of use. Ceasing the diversion of water from Timber Creek, from the Unnamed Stream, and from springs would dry up substantially less than 88 acres at the original place of use because growing vegetation would continue to consume water from subflows originating from Timber Creek and the Unnamed Stream as well as from spring flows.

Finding of Fact No. 17 – While there is contradictory testimony about the number of springs that arise on land comprising the current place of use for the water rights proposed to be transferred, this finding is believed to be accurate and is not changed.

Finding of Fact No. 18 – The finding in the Recommended Order did not state that if the application for transfer is approved, water “lost” as a result of diversions to the proposed new place of use would be “lost to the system.” In Finding of Fact No. 18, the hearing officer concludes that if the application for transfer is approved, the portion of water diverted that would not be consumed by growing crops at the new place of use would return to the system downstream of locations where return flows originating from diversions under the water rights currently return to Timber Creek. As a result, some of the return flows would be “lost” for use by downstream holders of junior water rights. In this Final Order, this finding is revised for clarification.

Finding of Fact No. 19 – Finding of Fact No. 19 is deleted from this Final Order.

Additional Finding of Fact – A new Finding of Fact regarding Water Right No. 74-00042 is not included in this Final Order. With qualifications, the protestant’s expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, approval of the application would not injure the rights of the protestant on Texas Creek. However, the protestant’s expert did not agree that there would be no enlargement in use or that there would be no injury to other water users on Timber Creek if the application is approved.

Conclusion of Law No. 5 – Implicit to this conclusion of law, as set forth in the Recommended Order, is that since the applicant did not establish that use of water at the new pivot would result in the same or smaller consumptive use than when used on the homesteads, the applicant did not establish that return flow relied upon by downstream junior appropriators would be the same or greater under the proposed transfer. However, this conclusion of law is revised in this final order to clarify that the applicant did not show that return flow relied upon by downstream junior appropriators would not be reduced under the transfer since the consumptive use resulting from use of the water rights at the new pivot would be greater than the consumptive use occurring from use of the water rights at the homesteads.

The applicant asserts that the holder of a water right for irrigation can change cropping patterns and the use of water for irrigation in ways that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. Therefore, the applicant argues, the only requirement for transferring a water right for irrigation to a new location within the same general area is the amount of acreage irrigated, and so long as the acreage irrigated at the new location is the same or less than the acreage irrigated at the original location, there is no requirement to show that consumptive use at the new location will be the same or less. The applicant is correct in asserting that the holder of a water right for irrigation can make changes that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. However, Idaho Code § 42-222(1) specifically requires that “no other water rights are injured” for the transfer of a water right to a new place of use to be approved. Since a reduction in the return flow relied upon by downstream junior appropriators constitutes injury, the transfer of a water right that would reduce the return flow relied upon by downstream junior appropriators can not be approved.

Conclusion of Law No. 7 – This conclusion of law is not changed. The rewording of the conclusion suggested by the applicant concedes that use of water under the transfer “may decrease the amount of return flow to Timber Creek [sic], in certain reaches” The applicant further suggests that because the decrease in return flow would not prevent Water Right No. 74-00042 from being fully satisfied, the protestant would not be injured. However, the requirement set forth by Idaho Code § 42-222(1) that “no other water rights are injured” for the transfer of a water right to be approved is not limited to only water rights held by a protestant.

With qualifications, the protestant’s expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, the proposed transfer would not injure the rights of the protestant on Texas Creek. But he did not agree that there would not be an enlargement in use or that there would not be injury to other water rights on Timber Creek. Since the proposed transfer would reduce the return flow relied upon by other holders of downstream junior water rights, one or more of those water right holders would be injured whether or not they protested the proposed transfer.

Conclusion of Law No. 8 – This conclusion of law is not changed.

Exceptions to Analysis – The analysis section has been revised to more clearly describe that if all diversions to the current place of use on the homesteads from Timber Creek, from the Unnamed Stream, and from springs were

terminated, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up. The applicant did not show that return flow relied upon by holders of downstream junior water rights would be the same or greater under the transfer because the consumptive use under the water rights at the new pivot would be greater than the consumptive use at the current place of use, the homesteads. The amount of land that would be irrigated under the proposed transfer (88 acres as claimed in the applicant's exceptions to Finding of Fact No. 11) is substantially more than the estimated 30 to 40 acres which would be dried up at the homesteads. An increase in the consumptive use from 30 or 40 acres to approximately 88 acres would reduce return flow and would injure other water rights.

The Department is authorized to approve a proposed change in whole or in part under certain circumstances. In this instance, however, the applicant did not propose a partial project. Additionally, the applicant did not show how 30 to 40 acres could be irrigated under the new pivot, which was set up to irrigate 99.2 to 105 acres, without injuring other water rights. Therefore, the Department should not partially approve this application.

Exceptions to Order – Paragraph 2 of the order is not changed.

Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. On October 24, 1984, the Department approved Transfer No. 3056 in connection with Water Right No. 74-00056 as follows:

Source:	(a) Unnamed Stream, tributary to Big Timber Creek (b) Big Timber Creek, tributary to Lemhi River
Priority:	May 1, 1910
Rate of diversion:	2.0 cubic feet per second ("cfs")
Point of diversion:	a) SW1/4NE1/4, Section 6, T14N, R26E, B.M. ¹ b) NWSE, Section 7, T14N, R26E, B.M.
Use:	Irrigation

¹ The "1/4" designations will be omitted from subsequent legal descriptions in this order.

Season of use: March 15 to November 15

Place of use: 75 acres² within parts of Sections 5, 6 and 7, T14N, R26E, B.M.

2. Water Right No. 74-01103 was decreed to Floyd J. Whittaker on December 30, 1982 as follows:

Source: Big Timber Creek, tributary to Lemhi River

Priority: November 19, 1922

Rate of diversion: 0.48 cfs

Point of diversion: SWNW, Section 5, T14N, R26E, B.M.

Use: Irrigation

Season of use: April 1 to November 1³

Place of use: 24.2 acres within parts of Section 5, T14N, R26E, B.M. and Section 32, T15N, R26E, B.M.

3. On March 30, 1998, James and/or Paula Whittaker ("applicant") filed Application for Transfer No. 5244 ("application") with the Department seeking to change the point of diversion and place of use of Water Right Nos. 74-00056 and 74-01103. The proposed new point of diversion is located within the SWNW, Section 20, T15N, R26E, B.M., and the proposed new place of use is 99.2 acres within the NE, Section 21, T15N, R26E, B.M.

4. The Department published notice of the application which was subsequently protested by Beva Lue Clark ("protestant").

5. Issues raised by the protestant are as follows:

- a. The proposed changes would injure other water rights;
- b. The proposed changes would constitute an enlargement in use of the original right; and
- c. The proposed changes would not be in the local public interest.

² Transfer No. 3056 inadvertently shows 74 acres instead of 75 acres as decreed in December 30, 1982.

³ The season of use recommended by the Department in the Snake River Basin Adjudication for Basin 74 is March 15 to November 15.

6. On April 7, 1999, the Department conducted a hearing on the application. The applicant was present and was represented by Jerry Rigby. The protestant was present and was represented by Kent Foster.
7. Exhibits accepted at the hearing as a part of the record are as follows:
 - a. Applicant's Exhibit A – Map showing Big Timber Creek, Texas Creek Area
 - b. Applicant's Exhibit B – Map showing the Big Timber Creek, Texas Creek Area, and the location of existing irrigation pivots
 - c. Applicant's Exhibit C – Map showing the location of the present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - d. Applicant's Exhibit D – Map showing the location of ditches from Big Timber Creek and irrigation pivots
 - e. Protestant's Exhibit 1 – Large topographical map made up of portions of four U. S. Geological Survey quadrangle maps
 - f. Protestant's Exhibit 2 – Report titled Impacts Assessment of the Proposed Stephenson Water Rights Transfer Application dated February 1, 1995
 - g. Protestant's Exhibit 3 – U. S. Geological Survey Map No. GQ-733 prepared by Edward T. Ruppel in 1968
 - h. Protestant's Exhibit 4 – Photocopy of a map prepared in 1972 by the Department of Water Resources for the Lemhi River Basin Adjudication showing the location of H.E.S. 236 and part of H.E.S. 657 on Big Timber Creek
 - i. Protestant's Exhibit 5 – Orthophotoquad Map, Leadore SW
 - j. Protestant's Exhibit 6 – Five colored photographs of present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - k. Protestant's Exhibit 7 – Photograph of weir on diversion from Big Timber Creek to the present place of use for Water Right Nos. 74-00056 and 74-01103

- l. Protestant's Exhibit 8 – Photograph of weir in Whittaker high ditch (the ditch to the pivots)
- m. Protestant's Exhibit 9 – Photograph showing Whittaker high ditch (the ditch to the pivots)
- n. Protestant's Exhibit 10 – Computer printouts of current meter calculations for measurements taken by Dr. Charles Brockway of flows in Whittaker high ditch from diversions out of Big Timber Creek
- o. Protestant's Exhibit 11 – U. S. Department of Agriculture ("USDA") aerial photograph showing location of existing pivots
- p. Protestant's Exhibit 12 – Computer enhanced photograph based on aerial photograph from Agricultural Stabilization and Conservation Service ("ASCS"), now the USDA Farm Service Agency, showing location of existing pivots
- q. Protestant's Exhibit 13 – Orthophotoquad Map of Purcell Springs Area, Leadore SE
- r. Protestant's Exhibit 14 – Computer enhanced copy of ASCS aerial photo showing location of new pivot
- s. Protestant's Exhibit 15 – Two combined USDA aerial photographs showing Purcell Springs Area
- t. Protestant's Exhibit 16 – Two combined aerial photographs showing panoramic view of location for new pivot and area that will cease to be irrigated
- u. Protestant's Exhibit 17 – Photograph of Whittaker property along Big Timber Creek

8. The general location of the irrigation use proposed in the application is in the upper end of the Lemhi River drainage about 4 miles south of Leadore, Idaho. Big Timber Creek ("Timber Creek") and Texas Creek, which are located approximately 3 miles apart, flow in a northerly direction toward Leadore. Texas Creek lies generally east of Timber Creek and joins with Timber Creek near Leadore to form the Lemhi River.

9. The property from which the applicant seeks to transfer water rights consists of parts of two homestead entries (the "homesteads") near the most upstream diversions on Timber Creek. The irrigated land is typical of a high mountain meadow, being rough and rolling in nature with high spots and low areas. Water consumed by crops growing on the homesteads originates from a combination of sources including two diversions for irrigation from Timber

Creek, a diversion for irrigation from an Unnamed Stream, spring flows, subsurface water, and precipitation. Timber Creek is the primary source of water diverted for irrigation on the homesteads. Every year, water is diverted from Timber Creek beginning in the spring and continuing until the diversions are shut off in early July, based on the relatively junior priorities of the decreed water rights. Diversions from the springs on the property provide only a small portion of the water diverted for irrigation. However, a determination of the amounts of water from specific sources consumed by crops growing on the homesteads is difficult, if not impossible, due to the nature of the land and the method of irrigation, which is termed "wild flooding."

10. The applicant proposes to cease using two diversions from Timber Creek and one diversion from the Unnamed Stream to the homesteads and to divert water under the water rights proposed for transfer at a location approximately 4½ miles downstream at another existing diversion on Timber Creek. From the latter existing point of diversion, water would be conveyed easterly approximately 2 miles through an existing ditch and pipeline to a new pivot irrigation system located in the NE of Section 21, T15N, R26E, B.M ("new pivot"). The existing ditch and pipeline delivers water diverted under other rights of the applicant to lands in the vicinity of the new pivot.

11. The location of the new pivot is approximately midway between Timber Creek and Texas Creek, but is closer to Texas Creek. The new pivot is adjacent to an existing pivot of the applicant set up in 1993 that irrigates about 195 acres. The new pivot, as constructed, is about 1,250 feet long and consists of 10 towers and an end gun. The new pivot is capable of irrigating from approximately 105 acres to 112 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 13 to 17 acres. The applicant proposes to irrigate the overlapping land with both pivots.

12. Water Right No. 74-00042 was decreed to James and Maybelle Ellsworth as follows:

Source:	Timber Creek
Priority:	November 1, 1888
Rate of diversion:	4.8 cfs
Place of use:	Same as for Right Nos. 74-00066 and 74-00067

13. Water Right Nos. 74-00066 and 74-00067 ("Ellsworth water rights") with priorities of June 1, 1880, and June 1, 1881, respectively, authorize diversion of water from Texas Creek to Ellsworth lands. These rights are related to Water Right No. 74-00042 diverted from Timber Creek, since Water Right Nos. 74-00066 and 74-00067 are each conditioned with the following language:

The rate of diversion from Texas Creek when added to a portion of right 74-00042 from Timber Creek actually delivered into the channel of Texas Creek by and through the Yearian-Timber Creek ditch shall not exceed 2.74 cfs (3.89 cfs for 74-00067).

14. The protestant's water rights authorize diversion of water from Texas Creek but not Timber Creek. The priorities of the protestant's rights from Texas Creek are 1913 and 1920 and are junior to the Ellsworth water rights described above. The protestant's rights are reduced or shut off when there is insufficient water in Texas Creek to fill prior rights.

15. The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Timber Creek water. Enlarged use will make less Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-00042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

16. There was substantial testimony, some of which was conflicting, in connection with the specific land included in the 99.2 acres to be dried up on the homesteads. The protestant provided substantial, credible testimony that if all diversions to the 99.2 acres shown as irrigated on the homesteads were shut off, only about 30 or 40 acres within the authorized place of use would actually be dried up. The remaining land would continue to be sub-irrigated with water from Timber Creek, the Unnamed Stream, and from spring flows.

17. There are approximately 6 or 8 springs that arise on the homesteads.

18. Water lost as a result of diversions to the homesteads returns to Timber Creek and is available for use by other downstream water rights on Timber Creek. If the application is approved, some of the water diverted to the new pivot would be lost in the conveyance ditch. Part of the lost water would return to lower portions of Timber Creek and part would be lost to deep percolation, probably returning to the surface near Leadore, Idaho.

19. The watermaster on Timber Creek and Texas Creek regulates or shuts off some diversions of water in most years due to water shortages.

ANALYSIS

The applicant is entitled to divert and use a water right, as decreed or as changed by an approved transfer, assuming the water right is used (and has been used) in compliance with the decree or transfer and has not been forfeited through non-use. The applicant is entitled to transfer the decreed water rights only to the extent of the historic beneficial use made of the water rights in the past. The applicant is not entitled to increase, through a transfer, the consumptive use of water made under the water rights, even if the applicant could have legally made a larger use of water under the water rights at the original place of use.

Testimony at the hearing shows that if the application is approved, an area of 99 to 105 acres would be irrigated under the new pivot and would consumptively use water diverted under the water rights. If all diversions cease to be made to the present authorized place of use at the

homesteads, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up and cease consumptively using water tributary to Timber Creek. The effect of approving the application would be to allow a larger consumptive use of water than has historically occurred under the water rights, thereby reducing return flows, and other water rights would be injured.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Idaho Code § 42-222.

5. The applicant has not shown that transferring the water rights for use at the new pivot would not reduce return flows relied upon by downstream junior appropriators since the consumptive use of the water diverted to the new pivot under the water rights would be greater than the consumptive use of the water diverted at the homesteads under the water rights.

6. Allowing a larger volume of water to be consumptively used after the transfer than the historic consumptive use of the water diverted by the applicant under the decreed water rights would constitute an enlargement in use of the original right and would violate Idaho Code § 42-222.

7. The applicant's use of water as proposed in the application will increase consumptive use, will decrease return flows to Timber Creek, and will injure other rights on Timber Creek. The proposed changes in use could also adversely affect the rights of the protestant who diverts water from Texas Creek, depending on the diversion practices of Ellsworth, on management practices of the applicant, and on the nature of return flows of water to Timber and Texas Creeks.

8. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that the motion of the protestant made during the hearing to summarily deny the application for failure to make a prima facie showing is **DENIED**.

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **DENIED** for failure of the applicant to show that the original right will not be enlarged and that there will not be injury to other water rights.

Signed this 20th day of December, 1999.




KARL J. DREHER
Director

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on the 20th day of December, 1999, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

JERRY RIGBY
RIGBY THATCHER ANDRUS
RIGBY KAM AND MOELLER
25 N 2ND E
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JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau